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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NOLAN MCCARTER, Defendant and Appellant.	B167845 (Los Angeles County Super. Ct. No. VA073128)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Nolan McCarter appeals from a judgment after a jury trial in which he was convicted of shooting at an inhabited dwelling (Pen. Code, § 246). Defendant contends the trial court erred: (1) in ruling on his *Pitchess*[1] motion; (2) in denying his pretrial motion to disclose the identity of a confidential informant; (3) in failing to dismiss after a prosecution witness volunteered prejudicial information in cross-examination; (4) in failing to dismiss for a violation of *Brady*;[2] and (5) in ordering him to be restrained by a stealth belt during trial. We affirm.

PROCEDURAL BACKGROUND

Defendant was charged by information with two counts of attempted murder (Pen. Code, §§ 664 & 187 subd. (a)) and one count of shooting at an inhabited dwelling, in connection with a shooting at an apartment building. Defendant entered a plea of not guilty. The case proceeded to jury trial. The jury convicted defendant of shooting at an inhabited dwelling. The jury was unable to reach verdicts on the attempted murder counts. The trial court first declared a mistrial and then dismissed those counts in the interest of justice (Pen. Code, § 1385). Defendant admitted a prior prison term allegation (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to eight years in prison. Defendant filed a timely notice of appeal.

FACTS

At approximately 11:30 p.m. on August 3, 2002, defendant drove in a tan Acura to an apartment building where a close acquaintance of his, called "Dank," used to live. A few people were in front of the building, including Robert Taylor, Wendie McGee, and

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

2 *Brady v. Maryland* (1963) 373 U.S. 83.

Antoinne Brown. Defendant jumped out of his car and asked Taylor if Dank was there. Taylor told defendant he had not seen Dank. Taylor and defendant had a "heated discussion," and defendant said he would return. McGee and Brown overheard the conversation. Defendant returned to his car and drove away. Taylor went inside; McGee and Brown remained in front of the building.

A few minutes later, defendant drove back to the apartment in the same car. As he drove past, he pointed a gun out the passenger window of his car and fired it repeatedly, aiming directly at McGee and Brown. McGee and Brown ducked for cover and were not struck. A number of bullets hit the apartment building.

After his arrest, defendant admitted to Detective Jonas Shipe of the Los Angeles County Sheriff's Department, the investigating officer, that he had driven to the apartment and spoken to Taylor about Dank. Defendant denied returning. Taylor identified defendant to Detective Shipe as the man who had asked for Dank and selected defendant from a photographic display. McGee and Brown testified that the man who shot at the building was definitely the man who had asked for Dank, and identified defendant as that man in a photographic display and at trial. The gun was not recovered.

DISCUSSION

I. ***Pitchess*** **Motion**

Prior to trial, defendant moved for discovery of confidential information in Detective Shipe's personnel file. Defendant sought information pertaining to accusations that Detective Shipe engaged in acts of: excessive force (defined as "any and all conduct which could in any way be described as aggressive behavior, violent, excessive force or attempted violence or excessive force"); bias (defined as "any and all conduct which could in any way be described as displaying a personal or other bias related to the race, gender, or sexual orientation of another person"); dishonesty (defined as "any and all

conduct which could be described as dishonest or displaying moral turpitude, such as false arrest, fabrication of evidence or probable cause, filing or writing false police reports, perjury, planting evidence or using false police reports to cover up the use of excessive force, improper police tactics, or making false or misleading internal reports such as false overtime or false medical reports"); coercive conduct; or acts "constituting a violation of the statutory or constitutional rights of others." Additionally, defendant sought disclosure of "[a]ny other material which is exculpatory or which impeaches the credibility of [Detective Shipe.]"

The motion was supported by a declaration of defense counsel which stated, on information and belief, that Detective Shipe had utilized "unethical, illegal, and/or improper tactics" to secure the witnesses' identifications of defendant as the shooter, because Detective Shipe had previously harassed defendant and indicated a desire to get him off the streets. Defense counsel also declared Detective Shipe had "embellished and/or misrepresented" facts by indicating in his police report and search warrant affidavit that defendant and Taylor had an "argument" when defendant came looking for Dank.

Based on this declaration, the trial court determined defendant had shown good cause for discovery of information relating to only the categories of witness coercion and false police reports. An in camera hearing was held with the custodian of records, and the trial court determined there were no discoverable materials relevant to those limited areas.

Defendant contends the trial court erred in limiting the areas to which he was entitled to discovery, and also seeks appellate review of the in camera proceeding.

A. Scope of Discovery

"When a defendant seeks discovery from a peace officer's personnel records, he or she must 'file a written motion with the appropriate court' (Evid. Code, § 1043, subd. (a))

and identify the proceeding, the party seeking disclosure, the peace officer, the governmental agency having custody of the records, and the time and place where the motion for disclosure will be heard (*id.*, subd. (b)(1)). In addition, the *Pitchess* motion must describe 'the type of records or information sought' (Evid. Code, § 1043, subd. (b)(2)) and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records' (*id.*, subd. (b)(3)). The affidavits may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information [citation]." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

"A showing of 'good cause' requires defendant to demonstrate the relevance of the requested information by providing a 'specific factual scenario' which establishes a 'plausible factual foundation' for the allegations of officer misconduct committed in connection with defendant." (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020.) "[A] showing of good cause must be based on a discovery request which is tailored to the specific officer misconduct that is alleged." (*Id.* at p. 1021.) "In other words, only documentation of past officer misconduct which is *similar* to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery." (*Ibid.*) Thus, for example, there is no good cause to discover complaints regarding excessive force in a case in which the defendant alleges coercive interrogation and not excessive force. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.)

The good cause requirement is not satisfied by a simple desire to obtain any evidence which might impeach the peace officer. (*California Highway Patrol v. Superior Court, supra,* 84 Cal.App.4th at p. 1024.) Thus, while it is established that nonfelony conduct involving moral turpitude is admissible to impeach a criminal witness

(*id.* at p. 1013), a defendant may not obtain discovery of all peace officer personnel records which might reflect moral turpitude, and must instead establish good cause for discovery relating to the particular type of misconduct at issue. (*Id.* at pp. 1023-1024.)

This requirement does not run afoul of *Brady v. Maryland* (1963) 373 U.S. 83. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471.) Under *Brady,* "the prosecution must disclose to the defense any evidence that is 'favorable to the accused' and is 'material' on the issue of either guilt or punishment. Failure to do so violates the accused's constitutional right to due process. [Citation.] Evidence is material under the *Brady* standard 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.) A prosecutor's duty of disclosure under *Brady* does not mandate relaxation of the "good cause" requirement for a defendant to obtain possible impeachment evidence from a peace officer's personnel file. (*People v. Gutierrez, supra,* 112 Cal.App.4th at pp. 1474-1476.) If a defendant cannot meet the "good cause" requirement for disclosure, the evidence sought would, by necessity, not meet the strict "materiality" requirement of *Brady*. (*Id.* at p. 1474.)

"A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard." (*People v. Jackson, supra,* 13 Cal.4th at p. 1220.)

Defendant contends the trial court abused its discretion in granting his *Pitchess* motion with respect to only witness coercion and false police reports. We conclude the trial court did not abuse its discretion. The declaration of defense counsel submitted in support of defendant's motion asserted that Detective Shipe coerced witnesses to falsely identify defendant, and falsified witness statements in his report and search warrant affidavit. The trial court therefore found good cause had been established with respect to those two areas. Good cause was not established with respect to the other areas in which defendant sought discovery. The declaration did not allege any factual scenario to which complaints of excessive force or bias would be relevant. Nor was good cause established

with respect to any type of dishonesty other than filing false police reports. Mere assertions that instances of other types of dishonesty might be relevant to impeach Detective Shipe are insufficient to justify discovery.

B. In Camera Review

Defendant next seeks review of the in camera proceeding. We have reviewed the transcripts of the in camera hearing and the personnel records reviewed by the trial court. We conclude the trial court fully complied with the requirements of Evidence Code section 1045, and did not abuse its discretion in refusing to disclose any of Detective Shipe's personnel records. (*People v. Mooc, supra,* 26 Cal.4th at p. 1228.)

II. Motion to Disclose Identity of Confidential Reliable Informant

Before trial, defendant moved for disclosure of the identity of the confidential reliable informant who had provided information Detective Shipe relied on in obtaining a search warrant.[3] No evidence was obtained on execution of the search warrant.

One page of the search warrant affidavit was filed under seal. The remainder of the affidavit indicated the confidential reliable informant gave Detective Shipe the following information: Defendant is a gang member. Defendant lives with his girlfriend and their baby at a house at 1304 1/2 West 35th Place. Defendant has a "dope house" at 1233 East 77th Street. Defendant told the informant that when he has to sleep in the neighborhood to watch his dope house, he stays at Bernard Clough's house, at 1224 East 76th Place. Bernard Clough is currently in prison, and his brother, Ronald Clough, is

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[3] In his brief on appeal, defendant contends he reasserted the motion based on testimony at trial. Although defense counsel did request disclosure at one point, when specifically asked by the trial court if defendant was "asking for disclosure of the informant," counsel responded, "Not at this stage."

taking care of his house. Three weeks after the shooting, the informant saw defendant at Bernard Clough's house with a revolver. The informant also observed defendant driving a gold Pontiac with license number 4FWR979. Detective Shipe determined the car was registered to Ronald Clough at the address of 1224 East 76th Place.

Defendant sought disclosure of the identity of the confidential informant, on the basis the informant might be a material witness. Defendant argued two bases for the materiality of the informant: the informant had identified a car defendant drove, so could possibly testify as to whether defendant had ever driven the car described by witnesses as being driven by the shooter; and "given the awareness of [defendant's] daily activities," the informant could possibly testify as to defendant's activities on the date of the shooting.

A hearing was held. Defendant did not offer any testimony at the hearing, relying only on the written motion and requesting the trial court review the sealed page of the search warrant affidavit to determine if it contained further evidence of the informant's materiality. The trial court reviewed the sealed page and determined it did not contain any further evidence of materiality. The trial court denied the motion, concluding defendant had failed to meet his burden of showing the informant was a material witness.

Evidence Code section 1041 provides "a public entity has a privilege to refuse to disclose the identity" of a confidential informant. "When, in any . . . criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so . . . , the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in

its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (Evid. Code, § 1042, subd. (d).) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of adducing ""'some evidence'"" on this score." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.)

"The existence of a 'reasonable possibility' an informant could provide exonerating evidence must be determined on a case-by-case basis. [Citation.] Whether the informant could provide such evidence is always somewhat speculative. [Citation.] When the informant is neither a participant nor an eyewitness to the charged offense the possibility is even more speculative, although still viable." (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1610.) "'The courts have indicated that the measure of the "reasonable possibility" standard to be utilized in individual cases is predicated upon the relative proximity of the informant to the offense charged. "[T]he evidentiary showing required by those decisions is . . . as to the quality of the vantage point from which the informer viewed either the *commission or the immediate antecedents* of the alleged crime." The existence of a reasonable possibility that testimony given by an unnamed informant could be relevant to the issue of defendant's guilt becomes less probable as "the degree of attenuation which marked the informer's nexus with the crime" decreases. If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence of a charge or information which rises from the arrest. Thus, "when the informer is shown to have been neither a participant in nor a non-participant eyewitness to the charged offense, the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility."'" (*In re Benny S.* (1993) 230 Cal.App.3d 102, 108.)

We review a trial court's finding on materiality for an abuse of discretion. (*People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1080.) On review, "great weight should be

afforded the trial court's determination." (*Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 421.)

Preliminarily, defendant contends the trial court erred in not holding an in camera hearing. This is incorrect. The prosecution did not request such a hearing; the trial court was therefore not required to hold one. (*In re Benny S., supra,* 230 Cal.App.3d at p. 107.)

Defendant next contends the trial court abused its discretion in finding he had failed to produce "some evidence" of a reasonable possibility that the informant could give evidence that might exonerate him. We disagree. The informant was neither a participant in the shooting nor a percipient witness. The informant viewed neither the offense nor its immediate antecedents. The two bases for materiality suggested by defendant, that the informant could identify all the vehicles driven by defendant and the informant might have known what defendant was doing the day of the shooting, are pure speculation. That the informant was able to identify one car the defendant was once seen driving does not give rise to an inference the informant could identify all such vehicles.[4] That the informant knew of defendant's drug dealing activities on a particular day three weeks after the shooting does not give rise to an inference he knew defendant's activities on the day of the shooting. The trial court did not abuse its discretion in finding there was no evidence of the informant's materiality.

We have reviewed the sealed page of the search warrant affidavit and conclude the trial court did not err in determining it contained no further evidence of the informant's materiality.

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[4] Moreover, such information could obviously be established from other sources.

III. Volunteering Prejudicial Information

Defendant next contends he is entitled to a dismissal of the charges due to the prejudicial information volunteered by Detective Shipe in cross-examination. Specifically, defendant contends the information was volunteered intentionally on the part of the prosecution, and therefore constituted prosecutorial misconduct of the type that must result in a mistrial with no right of retrial.

In recross-examination of Detective Shipe, defense counsel elicited the following testimony:

"Q What kind of location is this apartment?

"A It's an apartment building -- what --

"Q Would you say that there's prostitution at that building?

"A I don't know that location for prostitution.

"Q What about drugs and alcohol?

"A I don't know. I've never arrested anybody there and I've never observed any violations.

"Q Didn't make any investigation as to that building and that unit for purposes of this case?

"A Well, I know the past history of that building.

"Q And that is?

"A That [defendant] used to sell narcotics at that location.

"Q Did you tell the DA that?

"A Yes.

"Q Okay. Is that in your report?

"A No, it's not.

"Q Okay. So I wouldn't be aware of that, would I?

"A No. I had a confidential reliable informant tell me about this location prior to the shooting on August 3rd, 2002."[5]

Outside the presence of the jury, defense counsel moved to strike this testimony, and expressly disclaimed any intention to move for a mistrial. The trial court opined that a mistrial "would be called for, but since [defendant doesn't] want one," none would be forthcoming. The trial court stated it would therefore instruct the jury to disregard the testimony. The trial court directed the jury to "entirely disregard the last portion of the testimony relating to information purportedly provided by a confidential informant. That is hearsay. It's utterly inadmissible and impermissible and you are admonished to disregard it. As the jury instructions say, treat it as though you never heard of it. You may not allow that in any way, shape or form to affect your deliberations in this case."

The trial court was also concerned that if the police had information defendant had previously sold drugs at the location, the information should have been disclosed to the defense. On this basis, defendant moved to dismiss. The trial court denied the motion to dismiss, but again offered defendant a mistrial, which offer was again declined.

On appeal, defendant does not pursue any argument that the failure to disclose the information should have resulted in a dismissal of the charges.[6] Instead, defendant contends that Detective Shipe volunteered the information in an intentional act of witness misconduct, which is attributable to the prosecution and should therefore result in a complete dismissal.

"[T]he normal and usually sufficient remedy for the vast majority of instances of prejudicial prosecutorial misconduct that occur at trial is provided under the federal and

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5 Nothing in the record indicates whether this was the same informant on whom Detective Shipe had relied in obtaining the search warrant.

6 At trial, there was some suggestion the failure to disclose constituted a *Brady* violation. As the information was not exculpatory, there was no *Brady* error. At most, the failure to disclose the information constituted a breach of a discovery order. Defendant does not contend on appeal that a dismissal of the charges is an appropriate remedy for a discovery violation.

state *due process* clauses, and calls for either a declaration of mistrial followed by retrial, or a reversal of a defendant's conviction on appeal followed by retrial. The remedy mandated by the double jeopardy clause—an order barring retrial and leading to the dismissal of the criminal charges against the defendant without trial—is an unusual and extraordinary measure that should be invoked only with great caution." (*People v. Batts* (2003) 30 Cal.4th 660, 666.)

The double jeopardy clause of the California Constitution[7] bars retrial following the grant of a defendant's mistrial motion "(1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal." (*People v. Batts, supra,* 30 Cal.4th at p. 695.) We defer to the trial court's findings on the issue of the prosecutor's intent, and uphold the findings if supported by substantial evidence. (*Id.* at pp. 682-683.)

Defendant's motion to dismiss was pursued on the basis of a discovery violation and not intentional prosecutorial misconduct. As defendant failed to request a dismissal or mistrial with an order barring retrial on the basis of intentional prosecutorial misconduct, the contention is waived.

To the extent defendant's motion for a dismissal raised the issue, the trial court's denial of the motion implied a factual finding that the prosecutor did not intentionally

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[7] The double jeopardy clause of the California Constitution provides greater rights in this instance than the double jeopardy clause of the United States Constitution. (*People v. Batts, supra,* 30 Cal.4th at p. 665.)

commit misconduct.[8] That finding is supported by substantial evidence. Substantial evidence supports the conclusion the prosecutor was unaware Detective Shipe would make the statement. The statement was made by Detective Shipe in recross-examination. "The [prosecutor] could not reasonably have foreseen that [the witness] would volunteer an improper statement while being questioned by defense counsel." (*People v. Schmitt* (1957) 155 Cal.App.2d 87, 114; compare *People v. Cabrellis* (1967) 251 Cal.App.2d 681 [prosecutor elicited inadmissible evidence].) Moreover, this was not a subject the prosecutor had been ordered to inform the witnesses to avoid. (Compare *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782 [prosecutor did not properly instruct the witness to avoid reference to specific inadmissible matter].) Finally, we note that Detective Shipe did not volunteer the information when first asked by defense counsel if there were drugs at the apartment building, but only after repeated questioning by defense counsel.

IV. ***Brady***

Taylor's trial testimony was not as favorable as the prosecution had hoped. Taylor initially failed to identify defendant in court as the man who had asked for Dank and attempted to minimize his earlier identification of defendant from a photographic display, saying he had not been certain of the identification. Taylor also testified the discussion regarding Dank was not heated, and defendant did not say he would return—all in contrast to the statement Taylor had given Detective Shipe.

Detective Shipe was therefore called to testify to Taylor's statement. He testified he spoke with Taylor on August 16, 2002. At that time, Taylor had been certain of his

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[8] Defendant contends several of the trial court's comments taken out of context constitute "the factual findings necessary to conclude that the misconduct was deliberate and intended to result in prejudicing the jury or causing a mistrial." To the contrary, the trial court's comments indicate a belief the volunteered information was prejudicial and would justify a mistrial, but do not indicate a finding the prosecutor deliberately intended that result.

identification of defendant, said the discussion with defendant was heated, and stated defendant had said he would return.

Detective Shipe then testified that Taylor had been under the influence of alcohol on August 16, 2002. In cross-examination, Detective Shipe conceded that this fact was an important one and that he had omitted it from his report. Detective Shipe testified he had not told the prosecutor that Taylor had been under the influence of alcohol on August 16, 2002. However, Detective Shipe testified that Taylor had told him, on the way to the courthouse that morning, that he was an alcoholic, and Detective Shipe had relayed this information to the prosecutor. Neither fact had been disclosed to the defense.

Outside the presence of the jury, defendant moved to dismiss on the basis that the failure to disclose Taylor's alcoholism constituted a violation of *Brady*. The trial court concluded there was no prejudice from the delayed disclosure. The trial court denied the motion to dismiss, and offered defendant an opportunity to further cross-examine Taylor. However, the prosecution could not locate Taylor, and he was not returned to court. Under these circumstances, the trial court indicated it would strike Taylor's testimony if defendant wished. Defendant declined, preferring instead to argue the issue to the jury. The trial court also granted defendant's request for an instruction informing the jury that the prosecution's failure to timely disclose Detective Shipe's knowledge of Taylor's alcoholism and intoxication constituted a discovery violation.

Defendant contends the trial court erred in failing to grant his motion to dismiss the charges in light of this discovery violation.

Suppression by the prosecution of evidence favorable to the defendant violates due process where the evidence is material to either guilt or punishment. (*Brady v. Maryland, supra,* 373 U.S. at p. 87.) "Under the due process clause of the federal Constitution, the government has the obligation to disclose to the defendant evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment. [Citations.] Evidence is material if a reasonable probability exists that a different result would have occurred in the proceeding had the evidence been disclosed to

the defense. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings." (*People v. Jenkins* (2000) 22 Cal.4th 900, 954.) A delay in disclosure of evidence does not necessarily implicate a defendant's due process right to be informed of material evidence favorable to the accused. (*Id.* at p. 951.)

In this case, Taylor's alcoholism and state of intoxication on August 16, 2002, were disclosed to the defense during trial. The prosecution, through Detective Shipe, had learned of Taylor's alcoholism that morning, and had known Taylor appeared intoxicated when he gave his statement on August 16, 2002. A reasonable probability does not exist that a different result would have occurred in the proceeding had these facts been disclosed to the defense when learned by Detective Shipe. While Taylor's disappearance ultimately precluded the defense from cross-examining Taylor on these facts, Taylor gave little inculpatory testimony. As Taylor had denied at trial the inculpatory facts in his statement to police, cross-examining him on his state of intoxication when making the statement would have been of marginal value to the defense.[9] The true inculpatory evidence from Taylor was introduced when Detective Shipe testified to Taylor's August 16, 2002 statement. The defense had the opportunity to fully cross-examine Detective Shipe on Taylor's intoxication and raise the issue that Taylor's statement was not credible because it was given when he was intoxicated. The defense also had the opportunity to cross-examine Detective Shipe on his failure to disclose this information earlier. Defense counsel returned to the subject in argument to the jury, suggesting the prosecution's introduction of Taylor's testimony knowing he was an alcoholic "should trouble [the jury] to the core." Given the uses to which defendant put this information once it was disclosed, there is no reasonable probability that earlier disclosure of Taylor's

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9 While Detective Shipe knew of Taylor's intoxication on August 16, 2002, he did not know Taylor was an alcoholic until the morning Taylor testified. The trial court found that had Taylor's alcoholism been disclosed when learned, there would not have been enough time for defendant to retain an expert to testify on the effects of alcoholism on a percipient witness, so the delayed disclosure was not prejudicial to that extent. Defendant does not argue otherwise on appeal.

alcoholism and drunkenness could have been used by defendant to obtain an acquittal. We therefore conclude the information was not material within the meaning of *Brady*.

V. Stealth Belt

During trial, defendant was restrained with a "stealth belt," described as "a belt that would leave his hands free, but which would basically attach him to an eye hook in the back of the chair between the seat and the back of the chair. The only effect of it . . . is that it inhibits his ability to stand up." The trial court indicated the belt would be released if defendant chose to testify.

Defendant contends the trial court erred in requiring the stealth belt without sufficient evidence of a manifest need for such restraint based on defendant's prior conduct. (See *People v. Mar* (2002) 28 Cal.4th 1201, 1218.) Apart from whether the trial court abused its discretion in ordering the restraint, any error was harmless. Our Supreme Court has "'consistently found any unjustified . . . shackling harmless where there was no evidence it was seen by the jury. [Citations.]' [Citation.] Even a jury's brief observations of physical restraints generally have been found to be nonprejudicial." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213.) Here, there is no indication the jury was aware defendant was restrained in any way. Any error was therefore harmless.

VI. Cumulative Error

Defendant contends the cumulative effect of the claimed errors deprived defendant of a fair trial, and he is therefore entitled to a reversal and retrial. Defendant argues "[m]ost of the error in this trial stemmed from the deliberate actions of the prosecutor in withholding information vital to the defense and in prejudicing the jury with allusions to inadmissible former criminal activity." We note that, as a result of the discovery violation and the reference to defendant's prior criminal activity, defendant was offered a

mistrial by the trial court, which he explicitly rejected. Defendant cannot now seek that same remedy on the same facts. Setting those issues to one side, there was no cumulative error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.